to Requests 12, 17, 26 and 30, noting in connection with Request 17 that KFUO had already produced payroll records containing the information requested. The NAACP has failed to demonstrate that the Judge erred or abused his discretion in rendering these rulings.[14/]

25. It is important to note in connection with these discovery issues that on May 10, 1994, the Church filed a Second Supplemental Response to the NAACP's Initial Interrogatories which stated: "to the best of the Church's knowledge and information (after a search through the relevant records and interviews with appropriate persons at the Stations) no past or present employee or job applicant complained that the Stations discriminated against him or her on the grounds of race or religion during the specified period." Thus, to the extent that NAACP Requests 26 and 30 sought information of this sort, the Church in fact provided it to the NAACP.

26. Next, the NAACP complains about various NAACP exhibits that the Presiding Judge rejected on relevance and competence grounds. (NAACP Exceptions, at 2-3). However, the Judge's rulings on NAACP Exhibits 1-5 were entirely proper. He rejected NAACP Exhibit 1 because it was irrelevant, contained no reference to KFUO and did not rebut the Church's direct case. (Tr. 350-351). He rejected NAACP Exhibit 2 because there was no evidence that the persons identified had applied for jobs at KFUO; the exhibit failed to establish the competence of the witness; and to the extent the exhibit contained allegations concerning programming, it was not within the scope of the issues in the case. (Tr. 351-354). NAACP Exhibit 3 was rejected because it was irrelevant and unrelated to KFUO, and NAACP Exhibit 4 was rejected for the reasons given with respect to NAACP Exhibits 1, 2 and 3. (Tr. 355-357). The Judge rejected NAACP Exhibit 5 because the witness lacked the competence to testify to the matters in the exhibit, because the

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14/ The NAACP refers at Note 9 of its Exceptions to the Judge's oral ruling during a deposition. However, the deposition is not part of the record evidence and the Review Board should therefore disregard the reference and the groundless allegations made by the NAACP about the referenced rulings.

attachments were hearsay and for the same reasons given for rejecting the first four exhibits. (Tr. 357-359, 399). The Mass Media Bureau joined in the Church's objections to all of these exhibits.

27. Similarly, the NAACP attacks the Judge's rejection of NAACP Exhibit 14, the Declaration of Cari O'Halloran. Ms. O'Halloran's declaration was not provided to the other counsel or to the Judge until the last day of hearing sessions, despite the fact that the NAACP was ordered to exchange its rebuttal exhibits on June 17, 1994. Significantly, Ms. O'Halloran did not even execute the declaration until June 22, 1994 and did not telecopy it to counsel for the NAACP until late on June 23, 1994.

28. The Presiding Judge acted properly and within his discretion in rejecting this extremely untimely declaration. (Tr. 1081-1085). Moreover, as the Judge observed, the NAACP had been directed in Memorandum Opinion and Order, FCC 94M-318 (released May 5, 1994) (the "MO&O") to answer interrogatories filed by the Church seeking the identity of individuals with personal knowledge of the allegations directed against KFUO. The MO&O explicitly warned that "[s]ince discovery is designed, inter alia, to find potential witnesses and determine what they know, to avoid surprise, and to expedite the hearing, KFUO is entitled to this information to assist in its trial preparation." MO&O, at ¶ 4. The NAACP never identified Ms. O'Halloran in response to the MO&O. The NAACP's attempt to conduct a hearing by ambush must therefore be rejected.

29. Finally, the NAACP contends that the Judge "admitted, then disregarded" what the NAACP claims, without explanation, were "five critical and highly relevant NAACP exhibits." (NAACP Exceptions, at 6). But the NAACP's exhibits had little or no probative value and were given the weight they deserved.

(a) The first three exhibits to which the NAACP points, NAACP Exs. 10, 11, and 15, showed that it was in January 1990 that the Stations first contacted an Outreach Ministry for minority employment in Northern St. Louis and placed an advertisement in the St. Louis Sentinel.

The Church's exhibits and testimony showed the same date (Tr. 539, 540; Church Ex. 4, p. 15), and the Judge made findings consistent with that evidence in paragraphs 129-130 of the ID. Thus, the NAACP is simply wrong to argue that these exhibits were "disregarded."

(b) The next exhibit about which the NAACP complains, NAACP Exhibit 21, was a chart containing certain information about minority hiring at classical music stations throughout the United States. Without far more detail than NAACP Exhibit 21 provides, however, it is impossible to know whether those stations were more or less successful than KFUO in recruiting minorities. Moreover, even accepting the exhibit on its face, it is difficult to understand the point that the NAACP is trying to make. One of the stations in the NAACP's chart, KFSD-FM (San Diego), never had an African-American in a Top Four job category during the relevant years. Many of the other stations, including KKHI-AM-FM (San Francisco), KVOD-FM (Denver), WCRB-FM (Boston), WQRS-FM (Detroit), and WFMR-FM (Milwaukee), never had more than one African-American, and had no African-Americans for some or many of the relevant years. Two other classical stations, WNIB-FM (Chicago) and KXTR-FM (Kansas City), had one African-American in a Top Four job category throughout the relevant years. Thus, contrary to the NAACP's suggestion, KFUO's employment history in fact compares quite favorably with the data in the NAACP's Exhibit 21.

(c) The final exhibit about which the NAACP complains, NAACP's proposed Exhibit 65, was not a list of clients as the NAACP contends, but rather a "call list" of businesses in St. Louis divided among KFUO's salespersons. KFUO generated the list by, in effect, taking the yellow pages of St. Louis and dividing the listings among its salespersons in order to avoid problems that arise when two salespersons approach the same business. (Tr. 1074-1075). The Judge properly rejected the admission of the exhibit "for the reasons stated with respect to Exhibit 60," i.e., because it was not probative. (Tr. 1077; Tr. 1072; see Tr. 1064-72 (discussion of lack of relevance of

NAACP's proposed exhibit 60)). As found by the Judge in paragraph 197 of the ID, the Church was advised by its outside consultant that classical music experience was a valuable job qualification for salespersons and accepted that advice in good faith. Nothing in the "call list" of businesses contained in the NAACP's proposed Exhibit 65 does anything to undermine this fundamental point, and the Judge was therefore well within his discretion to reject the exhibit.[15/]

30. In short, none of the NAACP's objections to procedural rulings has any merit. The Judge appropriately exercised his duty to move the case forward "in an orderly fashion with due regard for equity and fairness." Chronicle Broadcasting Co., 20 F.C.C. 2d 728, at ¶ 3.

III. CONCLUSION

Based on the foregoing, the Church respectfully requests the Review Board to reject the NAACP's exceptions to the ID.

Respectfully submitted,

THE LUTHERAN CHURCH-MISSOURI SYNOD

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15/ See ¶ 18 infra. for a discussion of the standard of review of the Judge's decision.

CERTIFICATE OF SERVICE

I, MARIONETTA HOLMES, a secretary for the firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that I have this 6th day of December 1995, mailed by First Class, United States mail, postage paid, the foregoing "**REPLY TO EXCEPTIONS**" to the following:

*The Honorable Joseph A. Marino
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